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deduction if there is a real debt. Before the "business purpose" doctrine can be extended to the interest sphere, Congress must promulgate concrete guidelines for adherence for both the taxpayer and the Government.



COPYRIGHT AS COLLATERAL IN A SECURED TRANSACTION †

Introduction

The present Copyright Act¹ is an anachronism. The advent of modern means of diversified communications has greatly increased the economic importance of the copyright, for the copyright owner is no longer limited to the sale of reprinted copies as the only commercially feasible means of realizing economic gain. However, if the various media of communication are to be fully exploited by the copyright owner, the copyright and its divisible parts must be accessible to the modern vehicles of commercial transferability.

In modern commercial practice, businesses have become completely reliant on financing, since the size and complex form of contemporary business have rendered the cash system commercially infeasible. Financing is a system by which a financier advances the necessary capital to a business in exchange for a security interest in its assets. It has become the mainstay of modern business procedure. In order to protect both the financier and the debtor, an extensive but burdensome legal system of secured financing has developed. This system has been recently refined and co-ordinated by the Uniform Commercial Code (hereinafter referred to as the Code) which has been adopted by a majority of the states.

The amount of capital that a creditor is willing to advance to a business will depend on the reliability of the business and the value of the assets given as collateral. Those businesses which own copyrights or a divisible part of copyrights constitute a substantial portion of the business community. The ability of these businesses to effectively offer a copyright to a creditor as security for his loan will depend on the stability of this asset. Stability depends upon the answers to the following questions: (1) are the statutory rights which inure to a copyright adequate to enable feasible

† Winner of First Place in the 1964 Nathan Burkan Memorial Competition, St. John's University School of Law.

¹ 17 U.S.C. (1952).

exploitation; and (2) can the creditor reasonably protect his security interest in the copyright?

The purpose of this article is to explore and analyze the problems that would be encountered by a creditor who accepted a copyright as part of the security for his loan.

Applicability of the Copyright Act to Copyright Mortgages.

Section 28 of the Copyright Act provides that:

Copyright secured under this title or previous copyright laws of the United States may be assigned, granted, or mortgaged by an instrument in writing signed by the proprietor of the copyright, or may be bequeathed by will.²

However, section 30 which provides for recording states that:

Every assignment of copyright shall be recorded in the copyright office within three calendar months after its execution in the United States or within six calendar months after its execution without the limits of the United States, in default of which it shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice, whose assignment has been duly recorded.³

Therefore, although section 28 explicitly provides that a copyright may be mortgaged, section 30 is ambiguous as to the recording of such mortgage with the Copyright Office and the effect that a recorded mortgage has in relation to other transfers of the mortgaged copyright.

Unfortunately, legislative history is not illuminating as to the congressional intent behind the enactment of section 30⁴ and in view of this lack of definitive intent and the paucity of judicial decisions construing sections 28 and 30, the law in this area can be considered as being far from settled. Uncertainty exists with regard to:

- a) Whether federal filing is necessary to perfect a mortgage; and
- b) If federal filing is necessary to perfect a mortgage, what are the rights and priorities of the mortgagee?

Congress, pursuant to Article I, Section 8 of the United States Constitution, has the power to create a federal copyright and therefore the power to provide the manner in which the copyright may be transferred.⁵ However, the mere fact that Congress has been

² 17 U.S.C. § 28 (1952).

³ 17 U.S.C. § 30 (1952).

⁴ H.R. REP. NO. 2222, 60th Cong., 2d Sess. 19 (1909).

⁵ U.S. CONST. art. I, § 8, cl. 8: "To promote the Progress of Science

empowered to prescribe the requirements for alienability of a copyright does not of itself exclude the states' power to legislate in this area.⁶ Nevertheless, it should be noted that if Congress so desired, it could, by proper legislation, pre-empt the field.

The first problem to be resolved, therefore, is whether Congress by enacting Sections 28 and 30 of the Copyright Act has pre-empted the field by providing a comprehensive scheme which precludes state regulation. In the case of *Allen v. Riley*,⁷ the Supreme Court was confronted with the problem of whether Congress had pre-empted the field of patent⁸ transferability by the enactment of a provision which stated:

Every patent or any interest therein shall be assignable in law by an instrument in writing, and the patentee or his assigns or legal representatives may in like manner grant and convey an exclusive right under his patent to the whole or any specified part of the United States. An assignment, grant, or conveyance shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice, unless it is recorded in the Patent Office within three months from the date thereof.⁹

The Court held that this provision was not so comprehensive as to preclude the states from legislating on the subject, providing that any such legislation was neither inconsistent with, nor opposed to, the federal statute.¹⁰ Since the scope of that patent provision was at least as broad as the provisions of sections 28 and 30, it would appear that the Supreme Court's statement, allowing state legislation consistent with the federal schemes, applies to copyright transfers as well. However, the state provision before the Court in *Allen* did not regulate patent *mortgages*, but merely required the vendor of a patent to file a copy of the letters of patent and his right to vend. Therefore, although the case may be cited for the general proposition that sections 28 and 30 do not exclude all state regulation in the area, it is not authority for the more definitive statement that copyright *mortgages* are not within the exclusive realm of federal jurisdiction. Thus, because *Allen* can be distinguished factually, and because it is inconclusive authority as to copyright mortgages, the basic question as to whether Congress has pre-empted the field remains.

and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." *Ibid.* See generally *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834); *Welsbach Light Co. v. Cohn*, 181 Fed. 122 (2d Cir. 1910).

⁶ *Allen v. Riley*, 203 U.S. 347 (1906); *Cookson v. Louis Marx & Co.*, 23 F. Supp. 615 (S.D.N.Y. 1938).

⁷ 203 U.S. 347 (1906).

⁸ Congress' power to enact patent legislation is derived from the same source which gives it the power to enact copyright legislation. Furthermore, both rights are intangible in nature.

⁹ 16 Stat. 203 (1870). The current counterpart is 35 U.S.C. § 261 (1952).

¹⁰ *Allen v. Riley*, *supra* note 6, at 357.

In the case of *In re Leslie-Judge Co.*,¹¹ decided by the Second Circuit Court of Appeals, the court, by way of dictum, stated that a copyright could be mortgaged only under the federal copyright law.¹² In *Security-First Nat'l Bank v. Republic Pictures Corp.*,¹³ District Judge Yankwich stated that he considered the *Leslie* statement correct and hence would follow it.¹⁴ He rejected the argument that the *Leslie* conclusion was induced by the fact that under New York law there could not be a chattel mortgage of an intangible. However, this opinion was reversed by the Ninth Circuit Court of Appeals and, although the reversing court did not expressly contradict the decision, it may be surmised that the opinion is doubtful authority.

The *Leslie* dictum may be further questioned by referring to the official comments of the Code which state that:

Although the Federal Copyright Act contains provisions permitting the mortgage of a copyright and for the recording of an assignment of a copyright (17 U.S.C. §§ 28, 30) such a statute would not seem to contain sufficient provisions regulating the rights of the parties and third parties to exclude security interests in copyrights from the provisions of this Article.¹⁵

The fact that the Code comments make specific reference to the recording of a mortgaged copyright in a state filing office indicates that both the drafters of the Code and the states that have adopted it feel that the *Leslie* statement is not binding.

One highly authoritative article presents the opinion that Congress has pre-empted the field with respect to copyright mortgages.¹⁶ It justifies this conclusion by analogizing the Copyright Act to the Ship Mortgage Act.¹⁷ The cases cited under the Ship Mortgage Act hold that federal recordation, under the act, supercedes and excludes state laws and therefore, only federal filing is determinative.¹⁸ However, a comparison of the Ship Mortgage Act with Sections 28 and 30 of the Copyright Act indicates that the two acts are clearly distinguishable, and, therefore, the cases decided under the Ship Mortgage Act are completely inapplicable to the Copyright Act.

The Ship Mortgage Act, unlike the Copyright Act, expressly provides not only for the filing of mortgages, but also describes

¹¹ 272 Fed. 886 (2d Cir.), *cert. denied*, 256 U.S. 704 (1921).

¹² *Id.* at 888.

¹³ 97 F. Supp. 360 (S.D. Cal. 1951), *rev'd*, 197 F.2d 767 (9th Cir. 1952).

¹⁴ *Id.* at 368.

¹⁵ UCC § 9-104, comment.

¹⁶ Kaplan, *Literary And Artistic Property (Including Copyright) As Security: Problems Facing The Lender*, 19 LAW & CONTEMP. PROB. 254, 260-61 (1954).

¹⁷ 41 Stat. 1000, 46 U.S.C. §§ 911-84 (1958).

¹⁸ *Aldrich v. Aetna Co.*, 75 U.S. 491 (1869); *White's Bank v. Smith*, 74 U.S. 646 (1868).

the effect that such filing or its failure will have as against other parties.¹⁹ The Copyright Act, on the other hand, is silent as to whether the mortgage has to be filed and the effect of such filing upon other interests.

The proposition that section 30 applies to mortgages and, therefore, is comprehensive enough to exclude any state filing provisions, seems implicit in the wording of that section.²⁰ It provides that an assignment, unless recorded within prescribed time, "shall be void against any subsequent purchaser or mortgagee for a valuable consideration, without notice, whose assignment has been duly recorded."²¹ (Emphasis added.) If we suppose that the word "assignment" includes mortgages, as the sentence structure implies, then it may be concluded that Congress did have the intent to make section 30 applicable to mortgages, to the exclusion of state laws. If this is true, then the failure to expressly state this intent may be attributable to poor draftsmanship. To lend support to the argument that the word "assignment" includes mortgages, there are several early cases which hold that a mortgage of a patent is considered an assignment. The leading case supporting this doctrine is *Waterman v. Mackenzie*.²² The reasoning of this Court indicates an adherence to the old common-law doctrine that a mortgage was a transfer of title subject to reversion upon payment of the debt, rather than a lien transaction. However, the modern view of the nature of a mortgage generally disfavors the title transfer theory, accepting instead the lien theory.²³ Thus, the support the *Waterman* doctrine gives to the argument that "assignment" includes mortgages is probably weak in the light of modern standards.

The argument that "assignment" includes mortgages may be questioned on several further grounds. First, it is evident from the comprehensive provisions of the Ship Mortgage Act that Congress had the experience and the knowledge to draft and enact a statute providing for a federal system of filing copyright mortgages if it so desired that federal filing should be exclusive. Second, the position taken by the Copyright Office further weakens this argument. In the Rules and Regulations of the Copyright Office, Section 201.4 states that "assignments of copyright and other papers relative to copyrights will be recorded. . . ."²⁴ (Emphasis

¹⁹ 41 Stat. 1000, 46 U.S.C. § 921 (1958).

²⁰ See Latman, *The Recordation of Copyright Assignment And Licenses*, (Copyright Revision Report No. 19, p. 6, 1960), SUBCOMM. ON PATENTS, TRADEMARKS & COPYRIGHTS, SEN. COMM. ON THE JUDICIARY, 86th Cong., 1st Sess. 115 (Comm. Print 1960). (Hereafter referred to as Comm. Print).

²¹ 17 U.S.C. § 30 (1952).

²² 138 U.S. 252 (1890).

²³ 36 AM. JUR. *Mortgages* (1943); 1 JONES, CHATTEL MORTGAGES AND CONDITIONAL SALES (Bower's ed. 1933).

²⁴ 37 C.F.R. § 201.4 (1963).

added.) As an example of "other papers" the regulation cites mortgages.²⁵ Thus, it may be concluded that the Copyright Office itself does not believe that the term "assignment" includes mortgages so as to make section 30 applicable to mortgages.

As further evidence that Congress did not intend section 30 to apply to mortgages so as to exclude state filing provisions, reference may be made to a circular published by the Copyright Office.²⁶ This circular, in discussing sections 28 and 30, states that "the law also provides that assignments of copyrights should be recorded in the Copyright Office. This requirement apparently does not apply to *other types of transfers*. . . ." (Emphasis added.) The circular goes on to list mortgages as "other types of transfers," and does not include them within the term "assignment."

Another factor tending to show that Sections 28 and 30 of the present Copyright Act do not pre-empt the area is the attempt by the drafters of the newly proposed Copyright Act to resolve the existing conflict by including a provision for pre-emption by the federal law.²⁷ The newly proposed Copyright Act will prove a good barometer of congressional intent, for if the proposed section, providing for federal pre-emption is accepted as new law, the legal profession will have to conclude that Congress has intended to pre-empt the area of filing. If the section is rejected, Congress cannot be said to have intended to pre-empt the field.

At present, the arguments in support of the view that Congress has not precluded state legislation by section 30 appear to outweigh the arguments advanced in support of the view that federal law has pre-empted the field. However, the lack of definitive authority in this area and the magnitude of the conflict indicate that the problem is ripe for judicial determination. In order to predict the outcome of a court's adjudication, we must turn to those factors which the courts will undoubtedly consider.²⁸

Problems Posed by the Copyright Act

A. Grace Periods

The primary purpose of a recording statute is to provide constructive notice to subsequent purchasers and encumbrancers.²⁹ Statutes which provide for recordation of transfers offer a means

²⁵ Otherwise there would be no need for the Copyright Office to list mortgages in the group with "other papers."

²⁶ Copyright Office Circular 10 (1962).

²⁷ H.R. 11947, 88th Cong., 2d Sess. § 19 (1964). (Hereafter referred to as the Bill). The wording of this section, however, does not clearly provide for federal pre-emption and if enacted it may create many problems.

²⁸ *Ibid.*

²⁹ 45 AM. JUR. *Records & Recording Laws* § 81 (1943).

by which a potential transferee can ascertain the state of the title of his transferor. In order to have an effective recording system it is essential that all transferees be required to file an instrument which will give notice of their rights. To accomplish this, the recording statutes impose upon the transferee, as a condition precedent to the validity of his transfer as against a subsequent transferee, the obligation of recording his transfer. Section 30 is such a provision. However, in parts it is antiquated and ambiguous.

For example, section 30 allows for grace periods in which to file, viz., three months after execution in the United States, six months after execution without the United States. The effect of the grace provisions is that a prior assignee will prevail over a subsequent assignee without knowledge, even though he recorded first, so long as the prior assignee records within his grace period. Thus, any potential transferee, when he searches the record, cannot be certain at the time of the search that the transferor is the actual proprietor of the rights he is conveying.³⁰ The grace provision was common in early recordation statutes because of the lack of speedy means for transmission of documents to the recording office. However, the advent of modern communication has alleviated the need for these provisions.³¹ Although Mr. Latman, in his revision report on the recordation of assignments recognized this point,³² the new Copyright Bill still retains a grace period for filing.³³ The bill, however, would shorten the grace periods to two months from execution within the United States and four months from execution without the United States.³⁴

The ambiguities that section 30 creates are numerous. One, for example, is the failure expressly to state whether the grace period applies to the "subsequent purchaser or mortgagee." In other words, must the subsequent transferee record his conveyance within the specified grace period after execution in order to prevail over a prior transferee who has failed to record within his specified grace period? Section 30 states only: "whose assignment has been duly recorded." Mr. Latman considers that a provision requiring a subsequent assignee to file within the grace period is unnecessary.³⁵ However, Professor Nimmer, in his treatise on copyrights, states that a court in construing the word "duly" in section 30, would hold that the filing within the time requirement would be necessary

³⁰ The uncertainty with regard to the debtor's title would require the creditor to withhold his consideration for a period of six months after the execution and filing of the security agreement. This, however, is commercially unrealistic.

³¹ 4 AMERICAN LAW OF PROPERTY § 17.32 (Casner ed. 1952); Latman, *supra* note 20, at 16, Comm. Print, at 121.

³² Latman, *supra* note 20, at 16-17, Comm. Print, at 121-22.

³³ Bill § 18(e).

³⁴ *Ibid.*

³⁵ Latman, *supra* note 20, at 15, Comm. Print, at 120.

for a subsequent assignee to prevail.³⁶ The proposed act alleviates this problem by providing that if the transferee of the prior executed transfer fails to record within the grace period, then whoever records first prevails; however, if the subsequent assignee files before a late-filing prior assignee, he must be a good-faith transferee, without notice of a prior transfer for valuable consideration.³⁷

B. *Common-Law Copyrights, Uncompleted Works, Divisible Rights*

The present Copyright Act is inapplicable unless the statutory procedure for copyrighting has been properly followed. Therefore, section 30 would not apply to a common-law copyright or to an unfinished or contemplated work.³⁸ This creates problems which have practical import with respect to motion picture financing. The standard motion picture financing agreement includes as collateral the motion picture rights, the screenplay and the photoplay. At the time the financing agreement is executed, the producer usually has as his only asset the motion picture right or a screenplay which may be completed or in the process of being written; in practice, even the completed screenplay is not copyrighted.³⁹ Therefore, although the Copyright Office might record this financing agreement, such recordation would have no effect because of the inapplicability of the Copyright Act to those works. A creditor would thus have to avail himself of state filing provisions. However, even if he perfected his interest by state filing, the creditor would not be adequately protected because the producer might decide either to copyright the screenplay under the Copyright Act (provided it was completed), or to publish the screenplay thereby extinguishing the common-law copyright as well as the security interest in it. The producer could then convey to a purchaser who, absent knowledge of the prior security agreement, would prevail against a creditor who had the security interest in the screenplay before it was copyrighted. If, on the other hand, state filing laws were to apply to a statutory copyright, this problem would not arise since a subsequent purchaser or unsecured creditor would have constructive notice of the security agreement. This would be true because the subsequent purchaser, in examining the state files, would find the encumbrance against the producer's property.

Unlike motion picture financing, mortgages in common-law copyrights or unfinished works are not practical because the value of such works would be so speculative that no creditor would take

³⁶ NIMMER, COPYRIGHT § 123.2 (1963).

³⁷ Bill § 18(e).

³⁸ 17 U.S.C. § 2 (1952). Under a state system of security protection, no problem would arise because of the ability to utilize the floating lien.

³⁹ Interview with Robert McKean, Esq., partner, Simpson, Thatcher and Bartlett, in New York City, July, 1964.

a security interest in them. Instead, the creditor would probably look to other personalty of the author for collateral. A further shortcoming of the inapplicability of section 30 to mortgaged motion picture rights arises out of the legal distinction between the protection of a creditor when the producer-debtor is an assignee and when he is an exclusive licensee. Section 30 requires that only an *assignee* file his assignment as a condition to its validity against subsequent assignees. No filing is required to protect an *exclusive licensee* and therefore, his creditor. In other words, if the debtor is an assignee, the creditor is faced with the initial question of whether section 30 applies to his mortgage. If the debtor is a licensee, no such question exists since the creditor of a licensee is protected against all subsequent transferees with respect to the collateral.⁴⁰ However, the courts are divided as to whether an assignee of a mere motion picture right is an "assignee" within the meaning of section 30, or whether he is an exclusive licensee.⁴¹ The effect upon the creditor is that the statutory shortcoming coupled with judicial confusion creates an aura of uncertainty.

Similar statutory inadequacies exist with respect to the photoplay. A photoplay cannot be copyrighted under the present Copyright Act until it is in its completed form. Therefore, the security interest in each day's filming would have to be filed in a state filing office. Again, as was the case with the screenplay, if the producer copyrights the photoplay, the property is extinguished.

C. Copyright as Only Part of the Collateral

In a practical setting, where a copyright is given as collateral, the copyright would be only one of several assets which constitute the security. If federal filing is exclusive, the secured party would be confronted with the problem of whether he could file a security agreement in which the copyright is not the sole collateral. Although a state filing office would probably record such an instrument, since state law would at least be applicable to the non-copyright collateral,

⁴⁰ Since filing is not a condition to the validity of a transfer of a copyright license, the prior mortgagee of a copyright license has a prior right as against the world.

⁴¹ Among the cases which hold that a transfer of any part of a copyright is a license and not an assignment, see, *e.g.*, *Goldwyn Pictures Corp. v. Howells Sales Co.*, 282 Fed. 9 (2d Cir. 1922); *Misbourne Pictures Ltd. v. Johnson*, 90 F. Supp. 978 (S.D.N.Y. 1950), *aff'd*, 189 F.2d 774 (2d Cir. 1951). For cases inferring that the transfer is an assignment, see, *e.g.*, *Public Ledger v. New York Times*, 275 Fed. 562 (S.D.N.Y. 1921), *aff'd*, 279 Fed. 747 (2d Cir.), *cert. denied*, 258 U.S. 627 (1922); *Fitch v. Young*, 230 Fed. 743 (S.D.N.Y. 1916). See generally NIMMER, *op. cit. supra* note 36, at 119; Kaminstein, *Divisibility of Copyrights*, (Copyright Revision No. 11, 1960) SUBCOMM. ON PATENTS, TRADEMARKS & COPYRIGHTS, SEN. COMM. ON THE JUDICIARY, 86th Cong., 2d Sess. (Comm. Print 1960).

it is questionable whether the Copyright Office would accept for filing such a security device. This problem would become more acute if the copyright was not the primary collateral, and this is usually the case.⁴² Even if both the state filing office and the Copyright Office record this security interest, most of the problems would not be solved. One such problem would be the possible difference of durations for perfection.⁴³ Another is the possible cumbersome requirements of foreclosing. This would be especially true if it were deemed that only the federal courts had jurisdiction to foreclose the mortgage.⁴⁴ Even if federal jurisdiction were not exclusive, it would still entail an unjustifiable burden to foreclose since the issues of proper perfection and relative priorities would have to be decided with respect to both statutes.

D. *Difficulties Posed by the Proposed Act*

Under the proposed act many of the above problems would be eliminated. Since the common-law copyright in unpublished works has been pre-empted by the protection of the act,⁴⁵ a secured creditor's interest in the screenplay would be protected even if the producer decided to copyright it, provided that the agreement is filed in the Copyright Office. The uncertainty that existed with respect to the secured creditor's interest in the movie rights would also appear to be eliminated. The proposed act provides that the ownership of any of the copyright may be transferred in part⁴⁶ and that ownership of any of the particular rights which comprise the copyright is entitled to protection.⁴⁷ Under section 18 any transfer of copyright ownership may be recorded and, if so recorded, is entitled to the immunities that recordation offers.

However, even the proposed act does not appear to answer all the questions that may be raised with respect to copyright security financing. Since the field is one of constant development, the future probably holds new challenges perhaps not envisaged by the drafters of the proposed act, even after years of research.

One example of the proposed act's failure to cope with a developing problem is its ambiguous treatment of the security device known as the "pledge." A pledge is a security device whereby the debtor conveys to the creditor the personalty but not the title

⁴² Either the accounts receivable, the inventory or the equipment will usually constitute the primary collateral. Interview with Jack Raskin, Esq., partner, Weil, Gotchal & Manges, in New York City, July, 1964.

⁴³ State filing laws have a provision which limit the time in which a filing will constitute perfection of the security agreement. The Copyright Act has no such provision.

⁴⁴ See text accompanying notes 87-90 *infra*.

⁴⁵ Bill § 19(a).

⁴⁶ Bill § 14(d)(1).

⁴⁷ Bill § 14(d)(2).

thereto, as security for the debt.⁴⁸ Since the copyright is an intangible, the problem arises as to how one may convey possession of a copyright itself, without also conveying the title to it. The only possible way to do so would be by a writing which states that possession is in the creditor while title remains in the debtor. However, before thought is given to the manner of pledging copyrights, it must be determined whether a copyright can indeed be pledged within the meaning of applicable law. Because section 28 does not include in its list of feasible transfers the ability to pledge a copyright, there exists some uncertainty as to whether such a device is feasible.⁴⁹ Although cases involving the copyright as the subject of a pledge are not available for reference, several cases exist in which a patent was so used.⁵⁰ In none of these cases, however, did the court consider the actual question of whether a patent was pledgeable.⁵¹

If it be concluded that section 28 of the present act or section 14(d)(1) of the proposed act impliedly permits the pledge of a copyright, several problems might be raised which are similar to those confronting the mortgagee of a copyright: the pledgee would have to decide which filing system, state or federal, is determinative; and if federal filing is controlling, whether he could file a writing which constitutes a pledge and what effect such recordation would have; and if state filing is determinative, whether local law considerations must be taken into account.

The Code has eliminated the traditional form distinctions among the various security devices. In their place it has created a single security device called a "security interest."⁵² One form of a traditional security device which has been specifically incorporated into the Code's "security interest" is the pledge.⁵³ The concept of a pledge-possession of the personalty by the creditor and the retention of title by the debtor has, however, been retained. While the Code provides that a security interest can be perfected

⁴⁸ 1 JONES, *op. cit. supra* note 23, § 4.

⁴⁹ Kaplan, *supra* note 16, at 258.

⁵⁰ *Western Battery & Supply Co. v. Hazlett Storage Battery Co.*, 61 F.2d 220 (8th Cir. 1932), *cert. denied*, 288 U.S. 608 (1933); *Westmoreland Specialty Co. v. Hogan*, 167 Fed. 327 (3d Cir. 1909).

⁵¹ Although the nature of the patent and the copyright as intangibles is the same, the alienability provisions of the Patent Act differ from that in the Copyright Act. While § 28 of the Copyright Act lists the various methods of transfer, § 261 of the Patent Act, whose title is "Ownership; Assignment," states that: "subject to the provisions of this title, patents shall have the attributes of personal property." Therefore, since there is no express limitation against the pledging of a patent it can be concluded that the provision impliedly allows pledging. This cannot be said of the corresponding copyright provisions.

⁵² UCC § 9-101, comment.

⁵³ UCC § 9-102(2).

by possession of the collateral by the creditor,⁵⁴ a reading of section 9-305, and its official comments discloses that the general intangible is one of those classes of collateral where possession by the creditor will not constitute perfection.⁵⁵ The comments explain that the only way to perfect a security interest in a general intangible is by filing.⁵⁶ Thus, if state law is determinative, there can be no pledge—as that term is understood—of copyrights, and the question of whether the Copyright Act permits pledging becomes moot.

Uniform Commercial Code

Although the purpose of Article 9 of the Uniform Commercial Code is to set up a comprehensive, organized scheme for the regulation of secured transactions,⁵⁷ it does not offer legal certainty as to the rights of a creditor who takes as his collateral a copyright. In fact, it tends to further confuse the area.

Section 9-104 states that:

This article does not apply

- a) to a security interest subject to any statute of the United States such as the Ship Mortgage Act, 1920, to the extent that such statute governs the rights of parties to and third parties affected by transactions in particular types of property. . . .

Article 9, therefore, does not apply to security interests in copyrights to the extent that sections 28 and 30 govern the rights of the parties to the transaction and the effects of the transaction upon third parties. Since the question as to the comprehensiveness of sections 28 and 30 has not been resolved, the secured creditor's position is left in a legal limbo. The comments to section 9-104, although attempting to resolve the problem, offer little solace to the creditor. The comment states that:

Although the Federal Copyrights Act contains provisions permitting the mortgage of a copyright and for the recording of an assignment of a

⁵⁴ UCC §§ 9-302(1)(a), 9-305.

⁵⁵ UCC § 9-305, comment.

⁵⁶ The standard form motion picture financing agreement, which is filed, provides that the debtor shall hold the photoplay as trustee for the creditor as though the creditor was a pledgee-in-possession. Although the Code does not discuss the effect that a filed security agreement which provides for the pledging of the intangible collateral will have, the comments to § 9-305 invalidate the use of the above clause in a security agreement. The comment states that the debtor cannot qualify as an agent for the secured party in order that perfection be obtained by possession.

⁵⁷ UCC § 9-101, comment. This is not a comprehensive discussion of article 9. Such a task is beyond the scope of this paper. The purpose of the discussion is merely to highlight some of the advantages and disadvantages of the Code as it pertains to copyrights.

copyright (17 USC 28,30) such a statute would not *seem* to contain sufficient provisions regulating the rights of the parties and third parties to exclude security interests in copyrights from the provisions of this Article. [Emphasis added.]

This statement is not very illuminating since the use of the word "seem" tends to show that the Code's sponsors do not know to what extent sections 28 and 30 exclude the provisions of article 9.

The effect of the Code on transactions in which the copyright is part of the collateral is further complicated by section 9-302(3) which provides:

The filing provisions of this Article do not apply to a security interest in property subject to a statute

a) of the United States which provides for a national registration or filing of all security interests in such property. . . .

The official comments to this section include sections 28 and 30 as examples of federal statutes encompassed by the section. Therefore, to the degree that section 9-104 does not exclude the applicability of the Code to a security interest in copyrights, the secured creditor would have to contend with section 9-302.

To what extent the Code will be applicable to secured transactions involving the copyright will, therefore, depend upon the degree to which the Copyright Act applies. There are three possible systems which can exist: (1) control by state law only, to the exclusion of any federal regulation; (2) a dual system in which federal filing is necessary for perfection but all other aspects of secured transactions are governed by state law; and (3) preemption of the entire area by the Copyright Act. The following will, therefore, be a discussion of the Code's applicability under each of these systems.

A. *Exclusive State System of Security Protection*

If it is determined that the reference to mortgages in section 28 is merely permissive and that section 30 is not applicable to mortgages⁵⁸ then the state laws pertaining to secured transactions would govern. The first thing that should be noted, if it is determined that the above is true, is that section 28 requires that there be an instrument *in writing signed by the proprietor* of the copyrights. However, since section 9-203 requires for the validity of a non-possessory security interest a writing, a security agreement and the signature of the debtor, compliance with the Code will be compliance with the federal requirement.⁵⁹ However, the appli-

⁵⁸ See text accompanying notes 2-6 *supra*.

⁵⁹ See discussion *supra*, involving pledges, as to whether there can be a possessory perfection of a security interest without there being a writing which is signed by the debtor-proprietor.

cability or inapplicability of section 9-302(3)(a) is not as easily resolved. A literal reading of the section seems to say that if the property is subject to a federal statute which provides for the filing of a security interest in such property, then the filing provisions of article 9 are not applicable. Therefore, since the Copyright Act does provide for a national registration system, even though under our premise sections 28 and 30 do not provide for the federal filing of a security interest in a copyright, the filing provisions of the Code are inapplicable. This result would be incongruous and the proper meaning of section 9-302(3)(a) would seem to be that, to the extent that the Copyright Act does not regulate the recording of copyright transfers, the filing provisions of article 9 are applicable.⁶⁰

Unlike the Copyright Act, the Code expressly enables the parties to a secured transaction to take advantage of modern practical financing provisions.⁶¹ The ability to utilize these provisions will help facilitate commercial financing, especially in the motion picture industry. Two such provisions which can effectively be incorporated in the security agreement are the after-acquired property clause and the future advance clause. The after-acquired property clause operates so that collateral, whenever acquired, shall secure the obligations covered by the security agreement.⁶² Under a future advance clause the collateral described in the security agreement will cover any advances or other value given by the secured creditor in the future.⁶³ The incorporation of

⁶⁰ See SPIVAK, SECURED TRANSACTIONS 65 (1963).

⁶¹ Some examples of these provisions are: § 9-110 which provides for flexible rules of description of the collateral and §§ 9-306(1), (4) which provide for a simple, yet effective means of protecting "proceeds"; see also § 9-102, comment, with regard to the classification of the various types of collateral.

⁶² UCC § 9-204(3). The ability to incorporate such a provision in the security agreement is important in motion picture financing since the copyright will not come into existence until some time after the security interest has been perfected.

In order that the interest in the after-acquired property not be considered to be taken for an antecedent debt two tests must be met:

- 1) The secured party must, at the inception of the transaction, have given new value in some form,
- 2) The after-acquired property must have been received either (a) in the ordinary course of the debtor's business, or (b) by acquisition pursuant to a contract entered into within a reasonable time after the giving of new value and pursuant to the security agreement. UCC § 9-108, comment.

⁶³ UCC § 9-204(5). The importance of the floating lien can be shown from an examination of motion picture financing. When the financing agreement is executed, the producer usually does not own any copyrights; however, he does have an expectant copyright in the motion picture when it is finally completed. It is the ability of the security agreement to attach as collateral the copyright in the motion picture, upon which the secured creditor relies when he enters into the agreement.

these two provisions into the security agreement will create a "cross-security" under which collateral acquired at any time may secure advances whenever made.⁶⁴

The problem now presents itself as to whether the financing agreement should be filed.⁶⁵ Since the copyright is an intangible which is not represented by a symbolic document, a transfer of which would constitute a transfer of the copyright, the place in which to file the financing statement requires a special rule. Section 9-103(2) attempts to solve the problems caused by the nature of the copyright by providing that filing should be accomplished in the state where the debtor has his chief place of business.⁶⁶

Another benefit to be derived from article 9 is the ability to commingle the collateral under a single security agreement.⁶⁷ The fact that the nature of the individual items constituting the collateral is different does not complicate the filing procedure. The secured creditor does not have to determine the category of collateral to which a particular item belongs; he need only describe the individual item constituting the collateral in his financing statement.⁶⁸ Since in commercial practice the copyright will constitute only part of the collateral, this unified concept will have an important effect on secured transactions, particularly motion picture financing. The fact that the collateral may consist of general intangibles, equipment,⁶⁹ inventory,⁷⁰ contract rights,⁷¹ and accounts receivable,⁷² will, however, create a problem as to which jurisdiction's laws are applicable and therefore, where to file the agreement. Although the location where the debtor has his chief place of business will determine the jurisdiction applicable to the general intangible, in the case of equipment and inventory the

⁶⁴ UCC § 9-204, comment.

⁶⁵ Filing is necessary for the perfection of the security interest. UCC § 9-302; see §§ 9-301(1)(b) and 9-312(5) in regard to the priority of an unperfected security interest; § 9-402(1) in regard to the provisions necessary to be included in the filing statement (financing statement); and § 9-403 in regard to the duration of perfection after filing.

⁶⁶ Although "chief place of business" is not defined by the Code, in practice it would mean where the debtor would expect the financing statement to be filed.

Whether the Code itself is applicable will also depend on whether the debtor's chief place of business is within the jurisdiction of a state that has enacted the Code. If the state in which the debtor's chief place of business is located has enacted the Uniform Commercial Code, then perfection in that state will constitute perfection in any other state which also uses the Code. See UCC § 9-103, comment.

⁶⁷ UCC § 9-102.

⁶⁸ Coogan, *How To Create Security Interests Under The Code — And Why*, 48 CORNELL L.Q. 131, 158 (1962).

⁶⁹ UCC § 9-109(2).

⁷⁰ UCC § 9-109(4).

⁷¹ UCC § 9-106.

⁷² *Ibid.*

jurisdiction which controls is the one in which the equipment and inventory are located.⁷³ On the other hand, the jurisdiction in which the debtor keeps his records will determine the law applicable to the security interest in the contract rights and the accounts receivable.⁷⁴ Considering the general intangible, the equipment, and the inventory, the problem is not acute since, in the case of the motion picture, the equipment and the inventory will be located at the place where the picture is being made. If the picture is not being made in the state where the debtor has his chief place of business, then all the secured creditor need do is file a financing statement in the jurisdiction where the motion picture is being made and in the state where the debtor has his principal place of business.⁷⁵ However, with respect to the contract rights and the accounts receivable, the problems are not as easily resolved. Often, national publishers and movie distributors maintain regional offices which keep the records for the region in which they are located.⁷⁶ In order to protect himself the secured creditor would thus have to file in many jurisdictions. The problem is further complicated, with respect to the motion picture industry, since at the inception of the security agreement there are no accounts receivable; therefore, the after-acquired property clause would be applicable only to those accounts receivable kept in the debtor's chief place of business.⁷⁷

If an author or proprietor of a copyright sells the copyright but retains a security interest in it until the full purchase price is paid, or a creditor advances monies to a debtor in order that the debtor may acquire rights in or the use of collateral,⁷⁸ a special form of secured transaction, known as a purchase money security interest, is created.⁷⁹ The purchase money security interest is entitled to certain privileges and priorities that the normal security interest will not have. One such benefit that inures to a secured creditor with a purchase money security interest is the ability to take priority over a prior security interest which has an after-acquired property clause. If the secured party files his purchase money security interest within the ten-day grace period, he will have priority with respect to the particular collateral which

⁷³ UCC § 9-103.

⁷⁴ *Ibid.*

⁷⁵ In the case of the publishing company, the location of these items is also ascertained with ease.

⁷⁶ Coogan, *supra* note 68, at 171.

⁷⁷ If the secured creditor so desires he can file a financing statement before the security interest attaches in those states which have enacted the Code. UCC § 9-402.

⁷⁸ An example of this type of transaction occurs when a creditor advances money to a movie producer in order that the producer may purchase either the copyright or the movie rights on which he might already have an option.

⁷⁹ UCC § 9-107.

the purchase money security interest secures as against a prior secured party with an after-acquired property clause.⁸⁰

Upon default by the debtor, the satisfaction of the debt by the sale of the copyright will create special problems.⁸¹ The Copyright Act requires that all transfers are to be signed by the proprietor.⁸² If the proprietor refuses to assign his rights to either the secured creditor or to a purchaser from the secured creditor, then such secured creditor is confronted with the problem of whether someone else can sign for the debtor-proprietor. This problem was resolved by the Supreme Court in the case of *Ager v. Murray*.⁸³ The Court held that a patent or copyright could be subjected by judicial proceedings to the payment of the debts of the proprietor⁸⁴ and that if the proprietor refused to execute an assignment, the court could appoint a trustee to do so.⁸⁵

Another provision of article 9 that will be advantageous to the secured creditor if the debtor defaults is section 9-504(3). This section permits the disposition of a particular collateral to be in a unit or in parcels. Therefore, with regard to the copyright, the secured creditor could convey the various units which constitute the copyright—the motion picture rights, publishing rights, live performance rights, etc.—individually and would not have to resort to the sale of the whole copyright.⁸⁶ In this way the secured creditor would be able to realize a greater return than would be possible by a single sale.

B. *Federal Law Exclusive Only as to Filing*

Although an exclusive state filing system for copyright mortgages offers many benefits that a federal filing system cannot offer, it does create several problems. One such problem is

⁸⁰ UCC § 9-312(4). Another advantage that a purchase money security interest holder has is a limited priority over a bulk transferee and a lien creditor, § 9-302(2). However, no benefit occurs as against a subsequent assignee or secured party who files first, § 9-312, comment. If the collateral is inventory then the purchase money secured party must give notification, pursuant to §§ 9-312(3)(b) and (c), in order to prevail as against a prior secured party whose security agreement contained an after-acquired property clause.

⁸¹ For the general simplified default procedure, see §§ 9-503, 9-504.

⁸² 17 U.S.C. § 28 (1952).

⁸³ 105 U.S. 126 (1881).

⁸⁴ *Id.* at 128.

⁸⁵ *Id.* at 132. See also *Gillett v. Bate*, 86 N.Y. 87 (1881); *Pacific Bank v. Robinson*, 57 Cal. 520 (1881).

⁸⁶ Although, under the proposed Copyright Act the ability to sell divisible parts of the copyright is expressly provided for (§ 14(d)(1)), it is questionable under the present act whether such a sale is feasible, and if feasible, to what extent is it practical.

caused by the inherent nature of the copyright itself. The rights in the copyright inure to the proprietor by reason of the fact that his name is recorded in the Copyright Office as owner of the copyright. Therefore, the secured creditor would have to check with the Copyright Office to ascertain whether the debtor is the proprietor of the copyright. This, however, is not a cumbersome task for the secured creditor. What does create a problem is the inability of the secured creditor to prevent a subsequent bona fide assignee from destroying the secured creditor's security by filing his assignment in the Copyright Office. The only feasible way in which the secured party can protect himself is by filing some form of paper with the Copyright Office that will constitute notice to a subsequent assignee.⁸⁷

This leads us back to the problem first considered in this paper, as to what the effect of filing a mortgage of a copyright would have. Although the proposed Copyright Act would permit the secured creditor to file his security agreement with the Copyright Office so as to put a subsequent assignee on notice of his interest, it does not seem to be sufficiently broad in regard to protection and remedies so as to exclude article 9.⁸⁸ The following, therefore, will be a discussion of the applicability of the Code to a security interest which is filed pursuant to a federal filing statute.

In order that the secured creditor may take advantage of the various Code provisions, the Copyright Office must allow the recording of any security agreement in which some part of the collateral is or may be a copyright. Therefore, the Copyright Office would have to record security agreements in which the copyright is not the primary collateral, and security agreements in which the present collateral does not include a copyright but does have an after-acquired property clause.⁸⁹

If the Copyright Office will record any of these security agreements, then the creditor will have no problems as to the perfection of his security interest in the copyright under the Code, since filing under the Copyright Act will constitute perfection pursuant to section 9-302(4). In any event, the secured party will still have to file the same security agreement pursuant to the applicable provisions of article 9 in order that his security

⁸⁷ In the alternative, it is possible that a court if confronted with this problem would hold that the assignee was under an added obligation to search the state files. However, such a holding is improbable since § 30 makes no such inference.

⁸⁸ UCC § 9-104.

⁸⁹ The ability to effectively file a security agreement with an after-acquired property clause is extremely important where it is foreseeable that the debtor will obtain a copyright.

interest in the other collateral will be perfected too.⁹⁰ Once the filings have been accomplished, all the rights and remedies discussed in the previous section will be applicable with equal force to all the collateral.

C. *Exclusive Federal System*

If it is determined that the present or proposed Copyright Acts exclude state law entirely, the feasibility of using the copyright as collateral would be commercially impractical. Such a determination would completely exclude the applicability of any of the provisions of article 9.⁹¹ Where filing was within the federal cognizance, the provisions of the security agreement, as well as the rights and privileges of the secured creditor were the same, irrespective of the type of collateral. The same would not be true under an exclusive federal system which completely excludes article 9. Some examples of the inadequacies of both the present and proposed Copyright Acts are that they have insufficient provisions: for perfection;⁹² for creating an effective security interest prior to the creation of a copyright;⁹³ for utilizing the after-acquired property clause, the future advance clause, and the cross-security; for protection against the wrongful use of the collateral by the debtor; for restricting the debtor-proprietor in his use of his copyright by the security agreement; and for an easy means of satisfaction upon default by the debtor.

Since the present Copyright Act does not apply either to uncompleted works or completed unpublished works which have not been federally copyrighted, a security interest in these rights, for whatever value it might have,⁹⁴ would be subject entirely to article 9.

Jurisdiction of Disputes Involving Copyright Mortgages

As we have seen, the question of whether state filing or federal filing is determinative must be resolved. Such a determination, however, does not resolve the question of whether the federal or state courts have jurisdiction to judge disputes involving copyright mortgages. The fact that the *Republic Pictures* case held

⁹⁰ This is so since §§ 9-302(3) and (4) exempt only the property subject to the federal filing statute.

⁹¹ UCC § 9-104.

⁹² See discussion *supra* involving the inadequacy of the grace period.

⁹³ It is possible that under the proposed act this problem would be eliminated since the act will be applicable to the common-law copyright as it exists today.

⁹⁴ The collateral would be extinguished upon either publication or statutory copyrighting.

that foreclosure of copyright mortgages is within the exclusive jurisdiction of state courts should not preclude a consideration of which court system, federal or state, has or should have jurisdiction.⁹⁵

Courts presented with this problem will not have to rely solely on the *Republic* decision since there have been several other cases where the issue was before the court. One such instance was in the case of *Keiper v. Amico*.⁹⁶ In his decision sustaining the argument that the state courts had jurisdiction to foreclose a patent mortgage Judge Van Voorhis stated:

The contention that the Federal courts have exclusive jurisdiction of the action on the ground that it involves a patent is untenable. This is an action to foreclose a mortgage upon a patent and does not involve its validity. Both parties here concede that the patent is valid, and *the action arises under the mortgage and not under the Federal patent law.* (Emphasis added.)

In another case the plaintiff instituted proceedings in the Supreme Court of New York County claiming that title to certain copyrights should be vested in him. After the court decided adversely, he instituted an infringement action in the federal courts. However, the federal court dismissed the complaint stating that the state court was acting within its "jurisdictional competency."⁹⁷ It is also interesting to note that the state court opinion noted that the chattel mortgage of the copyright was filed in the New York County Register's Office and was foreclosed by a state proceeding.⁹⁸

If the federal courts have exclusive jurisdiction it must be predicated upon Sections 28 and 30 of the Copyright Act read in conjunction with Section 1338(a) of the Judiciary Act.⁹⁹ Section 28, in listing the various methods by which a copyright may be transferred, includes assignments, grants, and bequests by will, as well as mortgages. If this section confers jurisdiction upon the federal courts, pursuant to Section 1338(a) of the Judiciary Act, to adjudicate copyright mortgage actions, then this same section should, by the same reasoning, confer jurisdiction upon the federal courts where the action involves an assignment, grant, or a bequest by will of a copyright. We know that this is not the case. The courts have repeatedly held that issues involving assignments, grants, and bequests by will, of copyrights are exclusively within

⁹⁵ The United States Supreme Court has not as yet considered this problem and the Court of Appeals for the Ninth Circuit's decision is technically controlling only within that circuit. The exhaustive decision of Judge Yankwich might also tend to delineate the effectiveness of the court of appeals' decision if the problem was before another court without the Ninth Circuit.

⁹⁶ 174 Misc. 211, 20 N.Y.S.2d 480 (Sup. Ct. 1940).

⁹⁷ *Dorf v. Denton*, 17 F. Supp. 531, 533 (S.D.N.Y. 1937).

⁹⁸ *Greenberg v. Denton* (Spec. Term N.Y. County Feb. 27, 1936).

⁹⁹ 28 U.S.C. § 1338(a) (1959).

the jurisdiction of state courts.¹⁰⁰ As Circuit Judge Goodrich noted in his opinion in *Republic*, the mere fact that the right is derived from federal law does not of itself confer jurisdiction upon the federal courts.¹⁰¹ In fact, application of the converse of the reasoning used above indicates that state courts have jurisdiction of copyright mortgage actions.¹⁰²

The problem as to which court system has jurisdiction to adjudicate foreclosures of copyright mortgages has, in part, been caused by the intangible nature of the copyright itself. The early decisions, upon which some attorneys and judges still rely, exemplify the difficulty in foreclosing mortgages on intangibles. This is due to the in rem nature of a foreclosure action, which requires the court to obtain jurisdiction over the parties and the property in order to render an effective judgment.¹⁰³

Judge Yankwich was confronted with these problems in the *Republic Pictures* case and chose to resolve them in the light of the older cases. However, one month after Judge Yankwich's decision the Supreme Court, in the case of *Standard Oil Co. v. New Jersey*,¹⁰⁴ stated:

where the debtor and creditor are within the jurisdiction of a court, that court has constitutional power to deal with the debt. Since choses in action have no spatial or tangible existence, control over them can "only arise from control or power over the persons whose relationship are the source of the rights and obligations."¹⁰⁵

¹⁰⁰ See, e.g., *Luckett v. Delpark, Inc.*, 270 U.S. 496 (1926); *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908); *Platt & Munk Co. v. Republic Graphics, Inc.*, 315 F.2d 847 (2d Cir. 1963); *Wells v. Universal Pictures, Inc.*, 166 F.2d 690 (2d Cir. 1948); *Globe Steel Abrasive Co. v. National Metal Abrasive Co.*, 101 F.2d 489 (6th Cir. 1939).

¹⁰¹ *Republic Pictures Corp. v. Security-First Nat'l Bank*, 197 F.2d 767, 769-70 (9th Cir. 1952). He supports this conclusion by citing to ample authorities. *Id.* at 770 n.4.

¹⁰² The history of the Ship Mortgage Act is a good analogy to support this provision. Although the present Ship Mortgage Act has elaborate provisions describing the conditions under which the federal courts will have jurisdiction, the previous act merely provided that a mortgage was not valid against a subsequent bona fide purchaser unless recorded. Under numerous cases decided under the old act, courts consistently held that the provisions of that act did not confer jurisdiction upon the federal courts. See, e.g., *Detroit Trust Co. v. The Borlum*, 293 U.S. 21 (1934); *The J. E. Rumbell*, 148 U.S. 1 (1892).

¹⁰³ 3 FREEMAN, JUDGMENTS § 1520 (5th ed. 1933); see *Stevens v. Gladding*, 58 U.S. (17 How.) 447, 451 (1854) for a good example of early judicial difficulties with this concept.

¹⁰⁴ 341 U.S. 428 (1951); see also *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 312 (1949).

¹⁰⁵ *Id.* at 439. The Court continued by stating that the "situs of an intangible is fictional but control over parties whose judicially coerced action can make effective rights created by the chose in action enables the court with such control to dispose of the rights of the parties to the intangible." *Id.* at 439-40.

Although the *Standard Oil* case did not deal with copyrights, the statements made by the Court as to intangibles are certainly applicable to copyrights. Based upon the *Standard Oil* rationale and the fact that state courts are competent tribunals for the determination of assignments and titles to copyrights,¹⁰⁶ it appears logically consistent that state courts are the proper forums for copyright mortgage foreclosure.

Conclusion

The copyright has until recently been predominantly used by those in the entertainment industry. However, today other commercial enterprises are realizing the value of copyrighting. The toy industry, the game industry, and any of the many industries which utilize designs, such as the clothing or container industries are beginning to take advantage of the copyright laws. These businesses, especially the smaller ones, might find it very desirable to offer a copyright as collateral. However, if a creditor is going to accept the copyright as security, then the copyright must be readily marketable and the security interest in the copyright must be capable of adequate perfection.

If the lack of decisional law is a forecast of the impracticality of mortgaging the copyright, it is due to the ambiguity in the law and not to any inadequacy of the copyright as personalty.



THE SECURITIES ACTS AMENDMENTS OF 1964: EFFECT ON THE OVER-THE-COUNTER MARKET

The diversity and lack of organization of the over-the-counter markets have continuously perplexed those seeking to regulate them. The framers of the Securities Exchange Act stated that both the exchange and the over-the-counter markets were "affected with a national public interest."¹ However, the Act of 1934, while subjecting the exchange markets to detailed regulation, did not provide like provisions for the over-the-counter markets. Rather, it granted to the Securities and Exchange Commission broad rule-making power in relation to the over-the-counter market, without, however, providing any guidelines for the exercise of

¹⁰⁶ See cases cited note 109 *supra*.

¹ Securities Exchange Act of 1934, § 2, 48 Stat. 881, 15 U.S.C. § 78b (1958).